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negligence, the law presumes notice to the employer. *C. & R. I. Ry. Co. v. Doyle*, 18 Kan. 59.

An employee must make reasonable use of his faculties to avoid danger or injury in the course of his employment. *Hughes v. Winona, &c., Ry.*, 27 Minn.

137. And if he voluntarily exposes himself to danger that he knows, or by reasonable attention might know, he assumes all risks thereto. *Chicago & T. Ry. v. Simmons*, 11 Brad. 147.

CHARLES L. BILLINGS.

Chicago.

Supreme Court of Massachusetts.

COMMONWEALTH v. FRANKLIN PIERCE.

To constitute manslaughter where there is no evil intent it is not necessary that the killing should be the result of an unlawful act; it is sufficient if it is the result of reckless or foolhardy presumption, judged by the standard of what would be reckless in a man of ordinary prudence under the same circumstances.

The defendant, who publicly practised as a physician, being called upon to attend a sick woman, caused her with her consent to be kept in flannels saturated with kerosene for three days, by reason of which she died. There was evidence that he had made similar applications with favorable results in other cases, but that in one the effect had been to blister and burn the flesh, as in the present case. *Held*, that the jury having found that the application was made as the result of foolhardy presumption or gross negligence, a conviction of manslaughter was proper.

Commonwealth v. Thompson, 6 Mass. 134, criticised.

THE facts of this case are sufficiently stated in the opinion of the court, which was delivered by

HOLMES, J.—The defendant has been found guilty of manslaughter on evidence that he publicly practised as a physician, and, being called to attend a sick woman, caused her, with her consent, to be kept in flannels saturated with kerosene for three days, more or less, by reason of which she died. There was evidence that he had made similar applications with favorable results in other cases, but that in one the effect had been to blister and burn the flesh as in the present case.

The main questions which have been argued before us are raised by the fifth and sixth rulings requested on behalf of the defendant, but refused by the court, and by the instructions given upon the same matter. The fifth request was, shortly, that the defendant must have “so much knowledge or probable information of the fatal tendency of the prescription that [the death] may be reasonably presumed by the jury to be the effect of obstinate, wilful rashness, and not of an honest intent and expectation to cure.” The seventh request assumes the law to be as thus stated. The sixth request

was as follows: "If the defendant made the prescription with an honest purpose and intent to cure the deceased, he is not guilty of this offence, however gross his ignorance of the quality and tendency of the remedy prescribed, or of the nature of the disease, or of both." The eleventh request was substantially similar, except that it was confined to this indictment.

The court instructed the jury that "it is not necessary to show an evil intent;" that "if by gross and reckless negligence he caused the death, he is guilty of culpable homicide;" that "the question is whether the kerosene (if it was the cause of the death), either in its original application, renewal, or continuance, was applied as the result of foolhardy presumption or gross negligence on the part of the defendant;" and that the defendant was "to be tried by no other or higher standard of skill or learning than that which he necessarily assumed in treating her; that is, that he was able to do so without gross recklessness or foolhardy presumption in undertaking it." In other words, that the defendant's duty was not enhanced by any express or implied contract, but that he was bound at his peril to do no grossly reckless act when he intermeddled with the person of another, in the absence of any emergency or other exceptional circumstances.

The defendant relies on the case of *Commonwealth v. Thompson*, 6 Mass. 134, from which his fifth request is quoted in terms. His argument is based on another quotation from the same opinion: "To constitute manslaughter, the killing must have been a consequence of some unlawful act. Now there is no law which prohibits any man from prescribing for a sick person with his consent, if he honestly intends to cure him by his prescription." This language is ambiguous, and we must begin by disposing of a doubt to which it might give rise. If it means that the killing must be the consequence of an act which is unlawful for independent reasons apart from its likelihood to kill, it is wrong. Such may once have been the law, but for a long time it has been just as fully, and latterly, we may add, much more willingly, recognised that a man may commit murder or manslaughter by doing otherwise lawful acts recklessly, as that he may by doing acts unlawful for independent reasons, from which death accidentally ensues: 3 Inst. 57; 1 Hale P. C. 472-477; 1 Hawk. P. C. c. 29, §§ 3, 4, 12; c. 31, §§ 4-6; Foster 262, 263, *Homicide*, c. 1, § 4; Bl. Comm. 192,

197; 1 East P. C. 260 *et seq.*; *Hull's Case*, Kelyng 40, and cases cited below.

But recklessness in a moral sense means a certain state of consciousness with reference to the consequences of one's acts. No matter whether defined as indifference to what those consequences may be, or as a failure to consider their nature or probability as fully as the party might and ought to have done, it is understood to depend on the actual condition of the individual's mind with regard to consequences, as distinguished from mere knowledge of present or past facts or circumstances from which some one, or everybody, else might be led to anticipate or apprehend them if the supposed act were done. We have to determine whether recklessness in this sense was necessary to make the defendant guilty of felonious homicide, or whether his acts are to be judged by the external standard of what would be morally reckless under the circumstances known to him in a man of reasonable prudence.

More specifically, the questions raised by the foregoing requests and rulings are whether an actual good intent and the expectation of good results are an absolute justification of acts, however foolhardy they may be, if judged by the external standard supposed, and whether the defendant's ignorance of the tendencies of kerosene administered as it was will excuse the administration of it.

So far as civil liability is concerned, at least, it is very clear that what we have called the external standard would be applied, and that, if a man's conduct is such as would be negligent in a man of ordinary prudence, it is negligent in him. Unless he can bring himself within some broadly defined exception to general rules, the law deliberately leaves his idiosyncrasies out of account, and peremptorily assumes that he has as much capacity to judge and to foresee consequences as a man of ordinary prudence would have in the same situation. In the language of TINDAL, C. J., "Instead, therefore, of saying that the liability for negligence should be co-extensive with the judgment of each individual, which would be as variable as the length of the foot of each individual, we ought rather to adhere to the rule which requires in all cases a regard to caution such as a man of ordinary prudence would observe:" *Vaughan v. Menlove*, 4 Bing. N. C. 468, 475; s. c. 4 Scott 244.

If this is the rule adopted in regard to the redistribution of losses, which sound policy allows to rest where they fall in the absence of a clear reason to the contrary, there would seem to be at least

equal reason for adopting it in the criminal law, which has for its immediate object and task to establish a general standard, or at least general negative limits, of conduct for the community, in the interest of the safety of all.

There is no denying, however, that *Commonwealth v. Thompson*, although possibly distinguishable from the present case upon the evidence, tends very strongly to limit criminal liability more narrowly than the instructions given. But it is to be observed that the court did not intend to lay down any new law. They cited and meant to follow the statement of Lord HALE, 1 P. C. 429, to the effect "that if a physician, whether licensed or not, gives a person a potion, without any intent of doing him any bodily hurt, but with intent to cure or prevent a disease, and contrary to the expectation of the physician it kills him, he is not guilty of murder or manslaughter : " 6 Mass. 141. We think that the court fell into the mistake of taking Lord HALE too literally. Lord HALE himself admitted that other persons might make themselves liable by reckless conduct : 1 P. C. 472. We doubt if he meant to deny that a physician might do so as well as any one else. He has not been so understood in later times : *Rex v. Long*, 4 C. & P. 423, 436 ; *Webb's Case*, 2 Lewin 196, 211. His text is simply an abridgment of 4 Inst. 251. Lord COKE there cites the Mirror, c. 4, § 16, with seeming approval, in favor of the liability. The case cited by HALE does not deny it : Fitz. Abr. *Corone*, pl. 163. Another case of the same reign seems to recognise it. Y. B. 43 Ed. III. 33, pl. 38, where Thorp said that he had seen one indicted for killing a man, whom he had undertaken to cure, by want of care. And a multitude of modern cases have settled the law accordingly in England : *Rex v. Williamson*, 3 C. & P. 635 ; *Tessymond's Case*, 1 Lewin 169 ; *Ferguson's Case*, Id. 181 ; *Rex v. Simpson*, Willcock Med. Prof., part 2, ccxxvii. ; *Rex v. Long*, 4 C. & P. 398 ; *Rex v. Long*, Id. 423 ; *Rex v. Spiller*, 5 C. & P. 333 ; *Rex v. Senior*, 1 Moody 346 ; *Webb's Case*, 2 Lewin 196 ; s. c. 1 M. & Rob. 405 ; *The Queen v. Spilling*, 2 Id. 107 ; *Regina v. Whitehead*, 3 C. & K. 202 ; *Regina v. Crick*, 1 F. & F. 356 ; *Regina v. Crook*, Id. 521 ; *Regina v. Markuss*, 4 Id. 356 ; *Regina v. Chamberlain*, 10 Cox C. C. 486 ; *Regina v. Maclead*, 12 Id. 534. See also *Ann v. State*, 11 Humph. 159 ; *State v. Hardister*, 38 Ark. 605 ; and the Massachusetts cases cited below.

If a physician is not less liable for reckless conduct than other

people, the matter is clear in the light of admitted principle and the later Massachusetts cases. In dealing with a man who has no special training, the question whether his act would be reckless in a man of ordinary prudence is evidently equivalent to an inquiry into the degree of danger which common experience shows to attend the act under the circumstances known to the actor. The only difference is, that the latter inquiry is still more obviously external to the estimate formed by the actor personally than the former. But it is familiar law that an act causing death may be murder, manslaughter, or misadventure, according to the degree of danger attending it. If the danger is very great, as in the case of an assault with a weapon found by the jury to be deadly, or an assault with hands and feet upon a woman known to be exhausted by illness, it is murder: *Commonwealth v. Drew*, 4 Mass. 391, 396; *Commonwealth v. Fox*, 7 Gray 585. The doctrine is clearly stated in 1 East P. C. 262.

The very meaning of the fiction of implied malice in such cases at common law was, that a man might have to answer with his life for consequences which he neither intended nor foresaw. To say that he was presumed to have intended them is merely to adopt another fiction, and to disguise the truth. The truth was, that his failure or inability to predict them was immaterial, if, under the circumstances known to him, the court or jury, as the case might be, thought them obvious.

As implied malice signifies the highest degree of danger, and makes the act murder; so, if the danger is less, but still not so remote that it can be disregarded, the act will be called reckless, and will be manslaughter, as in the case of an ordinary assault with feet and hands, or a weapon not deadly, upon a well person. Cases of *Drew* and *Fox*, *ubi supra*. Or firing a pistol into the highway, when it does not amount to murder: *Burton's Case*, 1 Strange 487. Or slinging a cask over the highway in a customary, but insufficient mode: *Rigmaidon's Case*, 1 Lewin 180. See *Hull's Case*, Kelyng 40. Or careless driving: *Regina v. Timmins*, 7 C. & P. 499; *Regina v. Dalloway*, 2 Cox C. C. 273; *Regina v. Swindall*, 2 C. & K. 230.

If the principle which has thus been established both for murder and manslaughter is adhered to, the defendant's intention to produce the opposite result from that which came to pass, leaves him in the same position with regard to the present charge that he

would have been in if he had had no intention at all in the matter. We think that the principle must be adhered to, where, as here, the assumption to act as a physician was uncalled for by any sudden emergency, and no exceptional circumstances are shown; and that we cannot recognise a privilege to do acts manifestly endangering human life, on the ground of good intentions alone.

We have implied, however, in what we have said, that it is undoubtedly true, as a general proposition, that a man's liability for his acts is determined by their tendency under the circumstances known to him, and not by their tendency under all the circumstances actually affecting the result, whether known or unknown. And it may be asked why the dangerous character of kerosene, or "the fatal tendency of the prescription," as it was put in the fifth request, is not one of the circumstances the defendant's knowledge or ignorance of which might have a most important bearing on his guilt or innocence.

But knowledge of the dangerous character of a thing is only the equivalent of foresight of the way in which it will act. We admit that, if the thing is generally supposed to be universally harmless, and only a specialist would foresee that in a given case it would do damage, a person who did not foresee it, and who had no warning, would not be held liable for the harm. If men were held answerable for everything they did which was dangerous in fact, they would be held for all their acts from which harm in fact ensued. The use of the thing must be dangerous according to common experience, at least to the extent that there is a manifest and appreciable chance of harm from what is done, in view either of the actor's knowledge or of his conscious ignorance. And therefore, again, if the danger is due to the specific tendencies of the individual thing, and is not characteristic of the class to which it belongs, which seems to have been the view of the common law with regard to bulls, for instance, a person to be made liable must have notice of some past experience, or, as is commonly said, "of the quality of the beast." 1 Hale P. C. 430. But if the dangers are characteristic of the class according to common experience, then he who uses an article of the class upon another cannot escape on the ground that he had less than the common experience. Common experience is necessary to the man of ordinary prudence, and a man who assumes to act as the defendant did must have it at his peril. When the jury are asked whether a stick of a certain size

was a deadly weapon, they are not asked further whether the defendant knew that it was so. It is enough that he used and saw it such as it was: *Commonwealth v. Drew, ubi supra*; *Commonwealth v. Webster*, 5 Cush. 295, 306. So as to an assault and battery by the use of excessive force; *Commonwealth v. Randall*, 4 Gray 36. So here. The defendant knew that he was using kerosene. The jury have found that it was applied as the result of foolhardy presumption or gross negligence, and that is enough: *Commonwealth v. Stratton*, 114 Mass. 303, 305. Indeed, if the defendant had known the fatal tendency of the prescription, he would have been perilously near the line of murder: *Regina v. Packard*, C. & M. 236. It will not be necessary to invoke the authority of those exceptional decisions in which it has been held, with regard to knowledge of the circumstances, as distinguished from foresight of the consequences of an act, that, when certain of the circumstances were known, the party was bound at his peril to inquire as to the others, although not of a nature to be necessarily inferred from what were known: *Commonwealth v. Hallett*, 103 Mass. 452; *Regina v. Prince*, L. R., 2 C. C. 154; *Commonwealth v. Farren*, 9 Allen 489.

The remaining questions may be disposed of more shortly. When the defendant applied kerosene to the person of the deceased in a way which the jury have found to be reckless, or, in other words, seriously and unreasonably endangering life according to common experience, he did an act which his patient could not justify by her consent, and which therefore was an assault notwithstanding that consent: *Commonwealth v. Collberg*, 119 Mass. 350; see *Commonwealth v. Mink*, 123 Mass. 422, 425. It is unnecessary to rely on the principle of *Commonwealth v. Stratton*, 114 Mass. 303, that fraud may destroy the effect of consent, although evidently the consent in this case was based on the express or implied representations of the defendant concerning his experience.

As we have intimated above, an allegation that the defendant knew of the deadly tendency of the kerosene was not only unnecessary, but improper: *Regina v. Packard, ubi supra*. An allegation that the kerosene was of a dangerous tendency is superfluous, although similar allegations are often inserted in indictments, it being enough to allege the assault and that death did in fact result from it. It would be superfluous in the case of an assault with a staff, or where the death resulted from assault combined with expos-

ure. See *Commonwealth v. Macloon*, 101 Mass. 1. See further the second count, for causing death by exposure, in *Stockdale's Case*, 2 Lewin 220; *Regina v. Smith*, 11 Cox C. C. 210. The instructions to the jury on the standard of skill by which the defendant was to be tried, stated above, were as favorable to him as he could ask.

The objection to evidence of the defendant's previous unfavorable experience of the use of kerosene is not pressed. The admission of it in rebuttal was a matter of discretion: *Commonwealth v. Blair*, 126 Mass. 40.

Exceptions overruled.

Mr. Bishop, in his excellent work on Criminal Law, vol. 1, § 314 (7th ed.), lays down the rule as to homicide from carelessness, thus:

"Every act of gross carelessness, even in the performance of what is lawful, and *à fortiori* of what is not lawful, and every negligent omission of legal duty, whereby death ensues, is indictable either as murder or manslaughter:" *Rex v. Carr*, 8 C. & P. 163; *Reg. v. Haines*, 2 C. & K. 368; *Rex v. Sullivan*, 7 C. & P. 611; *Errington's Case*, 2 Lewin 217; *Reg. v. Edwards*, 8 C. & P. 611; *Ann v. State*, 11 Humph. 159; *U. S. v. Freeman*, 4 Mason 505; *Castell v. Bambridge*, 2 Stra. 856; *Rex v. Fray*, 1 East P. C. 236; *Reg. v. Marriott*, 8 C. P. 425; *U. S. v. Warner*, 4 McLean 463; *Rex v. Smith*, 2 C. & P. 449; 1 East P. C. 264, 331; *Hilton's Case*, 2 Lewin 214; *Reg. v. Barrett*, 2 C. & K. 343; *State v. Hoover*, 4 Dev. & Bat. 365; *Reg. v. Ellis*, 2 C. & K. 470; *Etchberry v. Levielle*, 2 Hilton 40; *State v. O'Brien*, 3 Vroom 169; *Reg. v. Martin*, 11 Cox C. C. 136.

"If a man take upon himself an office or duty requiring skill or care—if, by his ignorance, carelessness or negligence, he cause the death of another, he will be guilty of manslaughter. * * * If a person, whether a medical man or not, profess to deal with the life or health of another, he is bound to use competent skill and sufficient attention; and if he

cause the death of another through a gross want of either, he will be guilty of manslaughter:" 1 Arch. Cr. Pr. & Plead. *9, quoted by Mr. Bishop, 1 Bish. Cr. Law, § 314; *Reg. v. Spiller*, 5 C. & P. 333; *Reg. v. Van Butchell*, 3 Id. 629; *Reg. v. Williamson*, Id. 635; *Reg. v. St. John Long*, 4 Id. 398, 423; *Rex v. Webb*, 1 Moody & R. 405.

In vol. 2 of his work on Criminal Law, § 664, Mr. Bishop says:

"The doctrine as to physician and patient is not quite the same in England and the United States, and possibly it is not harmonious among our states. According to English adjudication, whenever one undertakes to cure another of disease, or to perform on him a surgical operation, he renders himself thereby liable to the criminal law, if he does not carry to this duty some degree of skill, though what degree may not be clear; consequently, if the patient dies through his ill treatment, he is indictable for manslaughter:" *Rex v. Spiller*, 5 C. & P. 333; *Ferguson's Case*, 1 Lewin 181; *Rex v. Senior*, 1 Moody 346; *Rex v. Webb*, 1 Moody & R. 405; 2 Lewin 196; *Reg. v. Spilling*, 2 Moody & R. 107; *Rex v. Long*, 4 C. & P. 398; *Rex v. Williamson*, 3 C. & P. 635; *Reg. v. Markuss*, 4 Fost. & F. 356; *Reg. v. Macleod*, 12 Cox C. C. 534; *Reg. v. Chamberlain*, 10 Id. 486; *Regina v. Spencer*, Id. 525. "Still [says Mr. Bishop in the same section], WILLES,

J., once put the doctrine in a more reasonable way, thus: 'If a man *knew* that he was using medicines beyond his knowledge, and was meddling with things beyond his reach, that was culpable rashness. Negligence might consist in using medicines in the use of which care was required, and of the properties of which the person using them was ignorant. A person who so took a leap in the dark in the administration of medicine was guilty of gross negligence.' " *Reg. v. Markuss*, 4 Post. & Fin. 356, 359. Mr. Bishop then very characteristically and somewhat dogmatically observes: "Now, in the facts of human life, the less a man understands of anything occult, like the unseen workings of medicine, the more confident he is that his knowledge of the thing is perfect. Therefore, some of our American courts have laid down the doctrine, not altogether inharmoniously with this utterance of the learned English judge, in substance, that, since it is lawful and commendable for one to cure another, if he undertakes this office in good faith, and adopts the treatment he deems best, he is not liable to be adjudged a felon, though the treatment should be erroneous, and, in the eyes of those who assume to know all about this subject, which in truth is understood by no mortal, grossly wrong; and though he is a person called by those who deem themselves wise, grossly ignorant of medicine and surgery:" 2 Bish. Cr. Law, § 664, citing *Commonwealth v. Thompson*, 6 Mass. 134; and *Rice v. State*, 8 Mo. 561.

We have quoted thus largely from Mr. Bishop's excellent book, because we believe that in thus dogmatizing concerning the lack of knowledge of their profession by those following the sister profession of medicine and surgery he has himself erred through insufficient knowledge of that profession. "If a man *knew* that he was using medicines beyond his knowledge, and was meddling with things above his reach, that was [indeed] culpable rashness."

But it does not appear that Mr. Justice WILLES, in the case from which the above quotation was made, which was from a charge to the jury at the Durham Assizes, 1864, intended to say that this was the only kind of culpable rashness. It seems, on the other hand, that this was merely an illustration; for he immediately adds: "Negligence might consist in using medicines in the use of which care was required," &c. See *supra*. That it was merely an illustration is further apparent from the fact that immediately thereafter he adds another illustration: "If a man were wounded, and another applied to his wound sulphuric acid, or something which was of a dangerous nature and ought not to be applied and which led to fatal results, then the person who applied this remedy would be answerable, and not the person who inflicted the wound, because a new cause had intervened." In the beginning of his charge the learned judge very properly said: "Every person who dealt with the health of others dealt with their lives, and every person who so dealt was bound to use reasonable care and not to be grossly negligent. * * * Another sort of gross negligence consisted in rashness, where a person was not sufficiently skilled in dealing with dangerous medicines which should be carefully used, of the properties of which he was ignorant, or how to administer a proper dose. A person who with ignorant rashness and without skill in his profession, used such a dangerous medicine, acted with gross negligence." The drug given in this case, and which caused death, was a tablespoonful of a tincture of colchicum seeds, containing eighty grains of the seeds, eighteen grains, as is said in the case, being a fatal dose.

In *Nanny Simpson's Case*, 1 Lewin 172, 262, the prisoner was indicted for manslaughter in having caused the death of a man by administering *white vitriol* as a medicine. BAILEY, J.: "I am

clear that if a person not having a medical education and in a place where persons of a medical education might be obtained takes on himself to administer medicine which may have a dangerous effect, and such medicine destroys the life of the person to whom it is administered, it is manslaughter. The party may not mean to cause death; on the contrary, he may mean to produce beneficial effects; but he has no right to hazard medicine of a dangerous tendency, where medical assistance can be obtained. If he does, he does it at his peril." See also *Tassymond's Case*, 1 Lewin 169, where the prisoner was convicted of manslaughter in causing the death of an infant by negligently selling laudanum for paregoric.

It may be conceded that the cases of *Commonwealth v. Thompson*, 6 Mass. 134 (decided in 1809); and *Rice v. State*, 8 Mo. 561 (decided in 1844), in the former of which the law of the case is contained in Chief Justice PARSONS'S charge to the jury that tried the prisoner, and the latter of which is apparently decided mainly upon the authority of the former, seem to lay down the rule that in order to warrant a conviction for murder or manslaughter, the defendant must have some knowledge of the fatal tendency of the prescription. An attentive perusal of these cases cannot fail, as it seems to us, to convince the reader that there was a palpable failure of justice in both cases.

In the case of *Commonwealth v. Thompson*, the defendant gave to the patient suffering with a cold, powdered lobelia, and persisted in giving it to him for a

period of eight days till he was so completely exhausted that no relief could be afforded, and he died of exhaustion. In *Rice v. The State* the defendant was employed by the husband of a woman near the end of the eighth month of pregnancy, to cure her of "sciatica;" and, after having been informed of her condition and that other physicians had cautioned against the use of vapor baths and emetics in her then condition, he commenced a course of treatment by steaming and giving lobelia, and persisted in this treatment till she had a premature delivery, a few days after which she died. The evidence showed that she had been married five years, and during that time had had three children, always doing well after a birth, and was in better health when the defendant commenced his practice on her than she had been for many years.

It seems unnecessary to multiply cases to show that the foregoing two cases are erroneous. The court in the principal case has, we think, shown it conclusively; and the passages quoted at the head of this note from Bishop and Archibald on Criminal Law, with the authorities there cited, lay down the rule that ought to govern such cases. The court in the principal case has carefully limited the application of the rule there laid down to cases where there was no sudden emergency and where no exceptional circumstances were shown, and thus limited, the rule of the case seems eminently reasonable, and grounded on the soundest views of public policy.

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Chicago.